Supreme Court, U.S.
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No. 01-995

IN THE

Supreme Court of the United States

THE UNIVERSITY OF MINNESOTA AND REGENTS OF THE UNIVERSITY OF MINNESOTA; WENDELL R. ANDERSON, *et al.*,

Petitioners,

v.

IAN MAITLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The Eighth Circuit Court of Appeals examined the nature of the Board of Regents of the University of Minnesota, and after a careful analysis of its powers and functions, concluded that the Regents were not "legislators." Was the Eighth Circuit wrong?

2. Is Title VII's prohibition of sex discrimination by state employees unconstitutional?

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STATEMENT OF THE CASE

Respondent Ian Maitland, a professor at the University of Minnesota, brought this sex discrimination claim under 42 U.S.C. § 1983 and 42 U.S.C. § 2000e, *et seq.* against the University of Minnesota, its Regents and President. Respondent challenged a sex-based pay plan which the University adopted because of the settlement of a class action lawsuit. Specifically, the University agreed to enter into a lawsuit settlement under which $3,000,000 in salary increases would be distributed exclusively to female academic employees:

> [E]ach beneficiary received an increase in salary whether her current salary was lower or higher than the salaries of similarly situated males. Male academic employees were not eligible for these increases.

Maitland v. University of Minnesota, 43 F.3d 357, 360 (8th Cir. 1994).

This case has made three trips to the Eighth Circuit Court of Appeals. In the first, the Eighth Circuit rejected Petitioner's attempt to dismiss the case and found that "it was readily foreseeable that the [settlement] might precipitate sex discrimination claims by Maitland or other male academic employees at the University." *Id.* at 364. In 1996, Petitioners again moved to dismiss based upon qualified immunity. The Eighth Circuit again refused to dismiss the case and found that fact issues remained for trial because the sex-based pay plan was adopted despite the fact that "there was a multiple regression analysis that showed no statistically significant salary discrimination." *Maitland v. University of*

Minnesota, 155 F.3d 1013, 1019 (8th Cir. 1998). The Eighth Circuit further found that the Petitioners "had strong reason to believe that a likely result of the plan would be to create a salary imbalance in favor of female academic employees." *Id.*

In 2000, Petitioners brought additional motions to dismiss based upon legislative and Eleventh Amendment immunity. The District Court denied both motions and the Eighth Circuit affirmed. *Maitland v. University of Minnesota*, 260 F.3d 959 (8th Cir. 2001). Petitioners have now requested that this Court review both the legislative and Eleventh Amendment immunity issues raised below.

SUMMARY OF ARGUMENT

The Regents of the University of Minnesota are not entitled to legislative immunity. In *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983), the Eighth Circuit Court of Appeals reviewed the structure and function of the Board of Regents and determined that its duties were primarily those of administrators and not a legislative body. Subsequent to this Court's decision in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), the Eighth Circuit Court of Appeals reaffirmed its finding that the University of Minnesota Board of Regents does not have the functional characteristics of a legislative body. *Maitland v. University of Minnesota*, 260 F.3d at 962-63. These Eighth Circuit opinions are consistent with the Court's legislative immunity opinions, including *Bogan*. There is no compelling reason why this Court should review the Eighth Circuit's fact-laden determination that the Board of Regents is an administrative, and not a legislative, body.

Defendant's claim of Eleventh Amendment immunity also does not warrant review by this Court. This Court's

decision in *Fitzpatrick v. Bitzer*, 422 U.S. 445 (1976) squarely stated that Title VII abrogates Eleventh Amendment immunity with respect to a claim of sex discrimination under Title VII of the Civil Rights Act. This Court's most recent opinions regarding the Eleventh Amendment have not called *Fitzpatrick* into question, and no circuit court has ever said that it does. Nor has any circuit court suggested that the prohibitions on intentional race or sex discrimination in Title VI, Title VII, or Title IX are outside of Congress' authority under Section 5.

Petitioner's allegation that certain elements of a 42 U.S.C. § 1983 claim under the Constitution might vary from Title VII's provisions for disparate impact, "mixed motives," and bona fide occupational qualification is irrelevant. Respondent is making no disparate impact claim, mixed motive, or other type of claim that varies from an action based upon the equal protection clause under 42 U.S.C. § 1983.

REASONS FOR DENYING THE WRIT

I. The University Of Minnesota Board Of Regents And Its President Cannot Avail Themselves Of Legislative Immunity In This Case.

In order to shield actions with legislative immunity, a court must first determine whether the defendants are "legislators," *Bogan v. Scott-Harris*, 523 U.S. 44, 53 (1998), or the "functional equivalent" of a legislative body. *Id.* Assuming that the group in question is determined to be a legislative body, a court must still determine whether the acts in question are legislative in nature. Whether an act is legislative "turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id.* at 54.

With respect to what constitutes a "legislative body" and what constitute "legislative acts," *Bogan* did not change the law in any respect. It merely extended these concepts to a local legislative body:

> It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities. In this case, petitioners argue that they, as local officials performing legislative functions, are entitled to the same protection. They further argue that their acts of introducing, voting for, and signing an ordinance eliminating the government office held by respondent constituted legislative activities. We agree on both counts . . .

Id. at 46.

A. The University Board of Regents is not a legislative body.

In *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983), the Eighth Circuit Court of Appeals determined that the University of Minnesota Regents are not legislators. The Eighth Circuit employed a functional analysis and determined as follows:

> The Regents do not qualify as legislators within the meaning of the legislative-immunity doctrine. Although the Regents are given the power "to enact laws for the government of the University" (Territorial Laws of Minnesota, 1851, Chapter 3, Section 9, applicable today by virtue of the Minnesota Constitution, Article XIII,

> Section 3), they are essentially administrators who oversee the operation of a state educational institution. . . . Their rule making powers are limited solely to the regulation of that institution. That state law may characterize their activity as "legislative" for some purposes is not controlling in the interpretation of a federal statute such as 42 U.S.C. § 1983.

Stanley v. Magrath, 719 F.2d at 284. The Eighth Circuit's recent decision in this case reaffirming *Stanley* rightly concludes that *Bogan* does not undercut *Stanley*'s finding with respect to the Board of Regents. *Maitland v. University of Minnesota*, 260 F.3d at 962-63. There is nothing in Stanley to indicate that the University Board of Regents was precluded from legislative immunity because it was viewed as too "local" (the only issue on which *Bogan* could conceivably have had any effect on *Stanley*'s continuing value). *Stanley* simply stands for the proposition that the Regents — whether viewed as a state, regional, or local group — do not qualify as "legislators" because of the limited administrative functions they serve and the lack of parallels between their work and constituencies and the work and constituencies of city council members, county commissioners, state legislators, or members of Congress.

The University describes the Board of Regents powers as "discretionary," involving "policy making," having "budgetary implications," and being "prospective" in nature. These vague attributes, however, are not sufficient to address the critical threshold question of whether such acts were performed by "legislators." Every public and private institution is governed by individuals who, to one extent or another, undertake "discretionary" acts set "policy," deal with

budgets and plan for the future. Such activities, however, do not make all such individuals "legislators." A "legislator" is ordinarily directly elected and subject to recall by the general population within their jurisdiction (e.g., state legislatures, township boards, city councils, local school boards — but not the University Regents), has taxing authority (*cf. Winberg v. University of Minnesota*, 499 N.W.2d 799, 802 (Minn. 1993) (University of Minnesota, unlike other Minnesota government entities, has no power to tax)), or is responsible for quintessentially legislative functions, such as the Regional Board in Lake Country Estates:

> [W]e considered the regional legislators [in Lake Country Estates] to be the functional equivalents of local legislators, noting that the regional agency was "comparable to a county or municipality" and that the function of the regional agency, regulation of land use, was "traditionally a function performed by local governments."

Bogan, 523 U.S. at 53. The Board in Lake Country has no parallels to the University Board of Regents. The Board of Regents was involved in settlement of a lawsuit and initiating a sex-based pay plan. The experience of litigating, settling, and paying money related to lawsuits is part of administering any public or private institution, and is not uniquely legislative.

There is no reason for this Court to exercise its discretion to review this case. The Eighth Circuit's determination that the University of Minnesota Regents are "essentially administrators," is by its nature a fact-laden determination, a determination made both before and after *Bogan*. If the Eighth Circuit had misapplied the law by, for example,

determining that the Regents are "too local" to avail themselves of the legislative immunity doctrine, Petitioners might have a more persuasive case. As it is, every Board of Regents in every state likely has a different design and different powers. With respect to the University of Minnesota Board of Regents, the Eighth Circuit has adequately settled this issue twice, and there is no conflict with any other circuit.[1]

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1. Petitioner attempts to create a circuit split by arguing as follows:

> [A]ll other federal and appellate courts addressing the issue of legislative immunity have applied *Bogen* differently than has the Eighth Circuit. Every other circuit considering the issue has interpreted *Bogen* to require a functional analysis of the specific legislative action taken and not a categorical determination that the governmental body at issue is not legislative.

Petition, pp. 13-14. This misstates the law in *Bogen*. *Bogen* restates the well established requirement that, for legislative immunity to apply, a court must first determine whether the defendants are "legislators." If the court answers the first question in the affirmative, it must then determine that the acts in question are "legislative acts." The Regents failed the first "categorical" test and were found not to be a "legislative body." The Eighth Circuit has reviewed the "function" of the Board of Regents and determined it to be "essentially administrative." This determination was made after reviewing the Board's various powers and responsibilities and was not casual labeling.

B. The Regents' acts that gave rise to this litigation were not legislative acts.

Assuming, arguendo, that the Board of Regents are "legislators," the defendant's request for absolute legislative immunity still must fail because the Regents' actions at issue in this lawsuit were not "legislative activities."

Not every action by a legislator is absolutely immune. The Court in *Bogan* found the city council protected by legislative immunity because the acts in question were quintessentially legislative in nature. These acts included voting for an ordinance, signing the ordinance into law, and introducing a budget. *Bogan*, 523 U.S. at 55. Petitioners argue that the acts involved in settling a lawsuit are "discretionary," "set policy," "had budgetary implications," and were "prospective." Terms such as these are amorphous and can be manipulated to apply to a wide variety of acts which are not uniquely legislative. Every administrative act of those who lead institutions involves some degree of "discretion," will include some policy and budgetary implications, and will be prospective in some sense of the word. But the settlement of a lawsuit is in essence an ad hoc reaction to the pressures of litigation. Like any other expense, the settlement will have some effect on some budget and may be "prospective" in the sense that some settlement payment is made after the settlement is approved. This does not change the fact, however, that most individuals involved in managing an institution must face litigation and litigation-related issues. Litigation settlements are not uniquely legislative.

Even if the settlement of lawsuits was in some general sense a uniquely legislative activity, this general principle would not apply to the University of Minnesota Board of

Regents. The Regents policies attached to Petitioners' addendum show that the Board of Regents were, at most, to be "consulted" on the settlement of a lawsuit. Petition, p. 4 ("As to settlement of claims, Regents' Policy requires that the President consult with the Board . . .") Consulting — as opposed to public deliberation and voting — is not in the least legislative, let alone uniquely legislative. Petitioners have never produced minutes or any other record of any vote on the proposed settlement. Apparently the "consulting" on the settlement occurred in a secret session protected by attorney-client privilege. Secret votes outside of the public record are clearly not legislative in nature.

The District Court and Eighth Circuit Court of Appeals were correct to deny Petitioners' motion to dismiss based upon legislative immunity.

II. Title VII Claims Against The State Are Not Barred By Eleventh Amendment Immunity.

Petitioners incorrectly state that this Court's decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) "left open" the determination of whether the Eleventh Amendment bars sex discrimination cases under Title VII against states. *Fitzpatrick* stated the issue to be resolved as follows:

> In the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress acting under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages in favor of a private individual against the state government, found to have subjected that person to employment discrimination on the basis of "race, color, religion, sex, or national origin." The principal question presented by these cases is whether, as against the

> shield of sovereign immunity afforded the state by the Eleventh Amendment (citation omitted), Congress has the power to authorize federal courts to enter such an award against the state as a means of enforcing the substantive guarantees of the Fourteenth Amendment. . . . we grant certiorari to resolve this important Constitutional question.

Fitzpatrick v. Bitzer, 427 U.S. at 447-48. Petitioners now argue that *Fitzpatrick* left open the very question it set out for itself. Contrary to Petitioners' suggestion, *Fitzpatrick* stands in direct conflict with Petitioners' argument, nothing in recent cases from this Court has affected the validity of *Fitzpatrick*, and no circuit split exists. No circuit court has suggested that the prohibitions on intentional race or sex discrimination under Titles VI, VII or IX are outside of Congress' authority under Section 5 or that *Fitzpatrick* is now in question.

The University argues that this Court's recent Eleventh Amendment opinions require a substantial legislative record before Eleventh Amendment immunity can be set aside, and that there is an absence of legislative history establishing that states have discriminated on the basis of sex. The Eighth Circuit Court of Appeals, however, in *Okruhlik v. University of Arkansas*, 255 F.3d 615, 624-25 (8th Cir. 2001), reviewed the extensive legislative record supporting Title VII's prohibitions against state-sponsored sex discrimination and found a more than adequate legislative basis for Title VII's remedies.

Petitioners counter that, though there may be some general legislative support for Title VII's application to state defendants, the support does not extend to this case because

the legislative history does not document discrimination by states against men in employment. The Eighth Circuit opinion in this case, however, makes it clear why a legislative record favoring every conceivable plaintiff is not necessary to support title VII's application to the states:

> Under the Defendants' reasoning, if a non-African-American minority employee brought a race-discrimination claim against his state employer under Title VII, and the legislative history of Title VII was devoid of any findings specific to that employee's minority group, the legislation would not abrogate the state's Eleventh Amendment immunity and the employee would be without recourse under Title VII. (Citations omitted). Even putting aside the rather obvious Equal Protection Clause problems to one side, we do not think that the defendants' reasoning afford us a proper approach towards application of the Eleventh Amendment.

Maitland v. University of Minnesota, 260 F.3d 959 at 965 n.5.

More importantly, even if the legislative history is determined to be lacking, such history is not determinative, or even of much help at all when the Court is dealing with conduct directly violative of the Constitution's Equal Protection Clause. The Court's analysis in recent cases underscores this point. In *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), this court first went through an extensive analysis demonstrating that the Age Discrimination in Employment Act prohibited much conduct not violative of the constitution. *Id.* at 82-87. Only after that did it examine the legislative history to determine if the ADEA

was nonetheless reasonable "prophylactic legislation" against widespread violations of the equal protection clause. *Id.* at 87-90. If the absence of findings of widespread Constitutional violations in the legislative history were dispositive, the first part of this analysis in *Kimel* would have been gratuitous.

Similarly, in *Fla. Pre-paid Post-secondary Educ. Expense Bd. v. College Save. Bank*, 527 U.S. 627 (1999), this Court first demonstrated that Congress was not responding to a widespread pattern of patent violations by state government in passing the Patent and Plant Variety Protection Remedy Clarification Act. *Id.* at 639-642. But even after that demonstration, this Court nonetheless conceded that "if the due process clause protects patents, we know of no reason why congress might not legislate against their deprivation without due process under § 5 of the Fourteenth Amendment." *Id.* at 642. It was only because the Congressional statute did not do that, but rather permitted a federal claim before any intentional deprivation by the State, that the act was beyond Congress's § 5 power. *Id.* at 642-43. In short, the absence of findings of constitutional violations is not sufficient to find that Congress exceeded it § 5 authority. There must also be a finding that the statute itself goes beyond violations of the Constitution. *See also Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) ("§ 5 legislation *reaching beyond the scope of Section 1's actual guarantees* must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' "). (Emphasis supplied.)

Unlike the Religious Freedom Restoration Act (*City of Boerne v. Flores*, 521 U.S. 507 (1997)), Patent Protection Act (*Florida Pre-Paid*), Americans with Disability Act (*Kimel*), Violence Against Women Act (*United States v. Morrison*, 529

U.S. 598 (2000)), and Americans with Disabilities Act (*Garrett*), Title VII's prohibition against sex discrimination is a close fit with the Fourteenth Amendment's prohibition against the denial of equal protection. Almost all established claims of sex discrimination will violate the Constitution. As a result, a search of the legislative record is not required by Title VII's proscriptions against sex discrimination. Title VII is not "prophylactic" legislation; it is direct implementation of the guarantee of equal protection. *Kimel* itself — the case which precipitated Petitioner's Motion to Dismiss based upon the Eleventh Amendment — specifically distinguished between the heightened scrutiny applicable to sex and race discrimination, and the "rational basis" scrutiny accorded age discrimination claims:

> Age classifications, *unlike governmental conduct based on race or gender*, cannot be characterized as "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . in contrast [to the rational basis review applied to age discrimination] when a state discriminates *on the basis of race or gender*, we require a tighter fit between the discriminatory means and the legitimate ends they serve.

Kimel, 528 U.S. 62 at 84 (emphasis added). Title VII claims of sex discrimination prohibit very little conduct that does not violate the Constitution. As such, there should be no question that Eleventh Amendment immunity is not available to the states as a defense to such actions.

Petitioners also argue that some of the remedies and defenses available in a Title VII claim are not identical to

those available for a constitutional claim under 42 U.S.C. § 1983. Specifically, Petitioners allege that a "disparate impact" approach to liability under Title VII does not have a parallel in the Constitution, the "mixed motive" Title VII claim would not be recognized in a case based solely on the Constitution and the Bona Fide Occupational Qualification ("BFOQ") varies from the similar defense available in a § 1983 action. This argument is irrelevant to this case. Respondent has not brought a disparate impact claim, has not alleged "mixed motive," nor have Petitioners asserted a BFOQ defense. Respondent's claim for intentional discrimination is without mixed motives. The lower court in this matter has established that Petitioners' intentionally established a sex based pay plan under which all women received raises and men received none. There is no reason for this court to opine on the constitutionality of some application of Title VII not before it. *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971) ("we need not find the language of § 1985(3) now before us constitutional in all its possible applications in order to uphold its facial constitutionality and its application to the Complaint in this case").

CONCLUSION

The Eighth Circuit's conclusion that the Board of Regents is an administrative body is a fact specific conclusion without consequences for other cases. The Eighth Circuit did not misapply *Bogan*. The Regents of the University of Minnesota are not "legislators" and did not engage in "legislative acts" when they settled the lawsuit that gave rise to this sex discrimination claim.

Sex discrimination claims under Title VII are a close fit with the constitutional guarantee of equal protection. Thus, Title VII prohibitions apply to a state institution irrespective of the Eleventh Amendment. Not one lower court anywhere has ever suggested that Title VII's prohibition of intentional sex discrimination is unconstitutional or that *Fitzpatrick* is no longer good law.

Respectfully submitted,

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